U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 February 2003

Case No: 2002-LHC-649

In the Matter of

ALBERT C. STOESSEL

Claimant

v.

BROWN & ROOT, INC.

Employer

ACE AMERICAN INSURANCE COMPANY

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

John S. Evangelisti, Esq.
Denver, Colorado
For Claimant

Monica F. Markovich, Esq.
BROWN SIMS, P.C.
Houston, Texas
For the Employer/Carrier

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), as amended, 33 U.S.C. § 901 et seq., and as extended by the Defense Base Act (DBA), 42 U.S.C. § 1651 et seq. A hearing was held on May 30, 2002 in Denver, Colorado.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been carefully reviewed and thoughtfully considered. References to "ALJX," "CX,"[1] "EX," and "JX" refer to Administrative Law Judge Exhibits, Claimant Exhibits, Employer Exhibits and Joint Exhibits, respectively. The transcript of the hearing is cited "Tr." and by page number.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

STIPULATIONS

1. Jurisdiction of this claim exists under the LHWCA, 33 U.S.C. § 901 et seq., as extended by the DBA, 42 U.S.C. § 1651 et seq.;

2. An Employer/Employee relationship existed at the time of the accident/injury;

3. The accident/injury arose out of and in the scope of employment;

4. The accident/injury occurred on March 30, 1996;

5. Employer was advised of or learned of the accident/injury on March 30, 1996;

6. Employer was given timely notice of the injury;

[1] Note: Claimant Exhibit 1 contains medical evidence that is separated into seventeen subsections. Therefore, reference to "CX 1" will be followed by the specific subsection reference, for example, "CX 1-12" would refer to CX 1 subsection 12.

7. Employer filed a first Report of Injury (LS-202) with the Secretary of Labor on April 3, 1996;

8. Employer filed a timely Notice of Controversion (LS-203) on November 8, 2001;

9. Disability payments were made as follows:

   a) From April 9, 1996 to February 1, 1999: Temporary total: $782.44 per week

   b) From February 1, 1999 to May 30, 2002: Temporary partial: $475.13 per week

10. Claimant's "usual employment" consisting of regular duties at the time of the injury as determined under § 8(h) of LHWCA was Commercial Driver;

11. Claimant has not returned to his usual employment with the Employer since the date of injury;

12. Claimant has had no earnings or employment since the date of the accident/injury;

13. Claimant has demonstrated a causal relationship between his alleged disability and his work accident. Therefore, he has invoked the presumption of causation contained in § 20(a).

ISSUES

1. The nature and extent of Claimant's disability;

2. Computation of Claimant's average weekly wage;

3. Whether Employer is liable under Section 7 for the cost of radio frequency treatments; and

4. Whether Employer is entitled to special fund relief under Section 8(f) of the Act.[2]

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[2] **The District Director has conceded Employer's eligibility for Section 8(f) Special Fund relief.** (ALJX 5). Therefore, the issue will not be discussed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Claimant, Albert C. Stoessel, was born on June 13, 1945. At the time of the hearing, Claimant had been married to his wife Nancy Stoessel for thirty-two years, and they continue to reside together. (Tr. 144). They have two children, none of whom were under eighteen or dependent upon them at the time this claim was filed. (Tr. 144).

Mr. Stoessel worked as a truck driver for over thirty years. (Tr. 55). A licensed Commercial Driver's License (CDL) tester, Mr. Stoessel was also trained in hazardous material handling and transportation. (Tr. 57, EX 12).

In February of 1992, back surgery was performed on Mr. Stoessel in which the L4, L5 and S1 vertebrae were fused. This spinal fusion was to correct spondyloisthesis[3] and relieve the back pain from which Mr. Stoessel was suffering. Mr. Stoessel ceased working for the remainder of 1992 to allow for full recovery. (Tr. 146). The surgery was successful and Mr. Stoessel had complete pain relief. (Tr. 146). He resumed full-time work in June of 1993 when he began working as a Hazardous Waste Driver with Envirodyne Corporation. (EX 12). In addition, Mr. Stoessel worked part-time as a substitute driver for Roadway Packaging Service (hereinafter "RPS") and as a consultant and driving tester for M & G Engines, Inc. (Tr. 124). The position with Envirodyne ended in June of 1995 as all required hauling had been completed. (Tr. 121). While searching for new full-time employment, Mr. Stoessel continued to work part-time as a consultant and tester for M & G Engines, a driver for RPS, and other assignments.

Early in the Fall of 1995 Mr. Stoessel sent a resume in response to a Brown & Root (Employer) newspaper advertisement for truck drivers overseas in the Balkans. (Tr. 54-55). In late December, Mr. Stoessel was contacted by a representative of Employer and told that Employer was unsure when hired drivers would be sent overseas. (Tr. 55). Mr. Stoessel was informed of the type of clothing and other items that he would need to bring with him. (Tr. 54). Although Claimant had no express promise of employment with Brown & Root, he did not seek or accept full-time employment with another employer as he anticipated employment with Brown & Root and leaving to work in the Balkans. (Tr. 76)

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[3] Spondylolisthesis is the "forward displacement of a vertebra over a lower segment, usually of the fourth or fifth lumbar vertebra due to a developmental defect." DORLAND'S POCKET MEDICAL DICTIONARY, 23d Ed. (1982).

Early in 1996, Employer contacted Mr. Stoessel with an offer of employment, which Mr. Stoessel accepted. On March 18, 1996, Employer sent Mr. Stoessel to Houston, Texas for orientation. (Tr. 169). During this time, Mr. Stoessel signed an employment contract and submitted to a physical examination. (EX 12). Claimant informed Employer during the physical of his prior back surgery. (Tr. 58). As a result of this information, Employer administered a back strength test, which Claimant passed. (Tr. 59).

On March 23, 1996, Claimant arrived in Kaposvár, Hungary and began training on the various vehicles. (CX 12). On March 30, 1996, Claimant was waiting in a break room for a safety meeting to start. (Tr. 64). When he attempted to rise from his chair, the chair collapsed and Claimant fell to the floor. (Tr. 65). Claimant felt pain immediately in his legs. (Tr. 65). Employer sent Claimant to an American military base for treatment. (EX 12). He was put on light duty and given pain medications. Claimant experienced pain in his back similar to that before his 1992 spinal fusion and "felt that [he] needed to get back to the States and get [his] back taken care of." (Tr. 66). Claimant understood that Employer intended to cutback on personnel and he volunteered to return to the States as part of a reduction in force so that he could seek medical treatment for his back.

Medical Evidence

Upon his return to the United States, Mr. Stoessel sought treatment from Dr. John A. Odom, Jr. who had performed his previous back surgery in 1992. Dr. Odom is board-certified in orthopaedic surgery. (CX 14). A May 30, 1996 MRI showed that Mr. Stoessel suffered a ruptured disc. (CX 1-1) On September 11, 1996, Dr. Odom performed an anterior spine fusion at L3-4 with a discectomy and a posterior spine fusion at L3-4 with decompression. (CX 1-1). Following the surgery, Mr. Stoessel did not find relief from his back pain although x-rays showed that the fused vertebrae had achieved union. (CX 1-1). Dr. Odom found that the L5 nerve root on the left side was under pressure and the likely source of Mr. Stoessel's pain.

Dr. W. Paul Gessner examined Mr. Stoessel on October 12, 1998 and recommended a nerve root injection and an epidural steroid injection in an effort to manage his pain. (CX 1-5). Dr. Gessner performed these procedures on December 4 and 8, 1998 respectively. On February 11, 1999, Dr. Odom performed a decompression of L4-5 and L5-S1. This procedure did not eliminate Claimant's pain. A December 8, 1999 MRI showed a herniated disc at L2-3 which blocked ninety percent of the spinal canal. A second fusion was considered, but not performed.

Mr. Stoessel sought treatment from his family physician Dr. Michael Mulligan as well during this time. (CX 1-2). Dr. Mulligan performed a physical and discussed Claimant's back pain and surgery with him. Additionally, he prescribed medications to help Mr. Stoessel manage his pain and to quit smoking.

Dr. Odom referred Mr. Stoessel to Dr. Robert E. Wright for pain management. Dr. Wright is board-certified in anesthesiology and practices interventional pain management. (CX 15). Dr. Wright performed an epiduroscopy and therapeutic removal of adhesions.[4] This procedure relieved Mr. Stoessel's pain initially, but the pain returned. Dr. Wright administered a CT scan which showed evidence of chronic radiculopathy[5] affecting the L5 nerve root and probable scar formations surrounding that nerve root. (CX 1-9). This diagnosis was confirmed by an electromyogram performed by Dr. Bruce H. Peters. (CX 1-10). Dr. Peters recommended the implantation of a morphine pump. In November, 2000, Dr. Wright performed a spinal cord stimulation, which did not relieve Claimant's pain. Dr. Wright performed radio frequency treatments on November 8, 2001 and February 6, 2002, from which Mr. Stoessel experienced temporary pain reduction. (CX 1-9). Dr. Wright attributed Claimant's pain to nerve injury or compression of the nerve. (CX 16). Furthermore, Dr. Wright opined that Claimant's condition was permanent and that his pain will continue indefinitely. (CX 16).

In addition to seeing Dr. Wright, Mr. Stoessel sought treatment from Dr. George A. Frey, who is board-certified in orthopaedic surgery. In February, 2001, Dr. Frey performed a wide hemilaminectomy[6] of the L5 vertebra, a partial hemilaminectomy of the left L4 and S1 vertebrae, and a pediclectomy[7] in order to decompress the nerve root. (CX 1-11). This surgery also did not lessen Mr. Stoessel's pain. Post-surgery, Dr. Daniel M. Perriman treated Mr. Stoessel for an infection at the surgical sight. (CX 1-11). Dr. Frey and Dr. Stephen H. Barkow administered epidural steroid injections to offer temporary pain relief. However, Dr. Frey stated in his physician notes and testified that, from a "structural standpoint," Mr. Stoessel had reached maximum medical

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[4] An epidurascopy involves the examination of the dura mater, the outermost membrane of the spinal cord.

[5] Radiculopathy is a disease of the nerve roots.

[6] Hemilaminectomy is the removal of the posterior arch of a vertebra on one side only. DORLAND'S POCKET MEDICAL DICTIONARY,, 23d Ed. (1982).

[7] A pediclectomy is the removal of a stemlike growth, which in this case was the removal of bone from the spine.

improvement (MMI) as of July 19, 2001. (CX 1-11, CX 10). Dr. Frey noted that there was nothing more surgically to be done for Mr. Stoessel and that his pain stemmed from a "very chronic nerve injury." (CX 10 at 12). He recommended that Claimant not continue to have steroid injections "on an indefinite basis" due to long-term side effects from such treatments. (CX 10 at 40).

Dr. Frey opined that Claimant has "severe limitations in virtually all activities." (CX 10 at 15). He testified that he felt Mr. Stoessel would not be able to work a "forty-hour work week, eight hours a day, five days a week." (CX 10 at 43). In addition, he testified that Claimant should not drive while on narcotics.

Dr. Leonard E. Berk examined Claimant on July 24, 1996 and August 21, 1998. (CX 1-5). Dr. Berk opined that Claimant suffered from Reflex Sympathetic Dystrophy (RSD), also known as Complex Regional Pain Syndrome.[8] He based this diagnosis on Claimant's "pain pattern," changes in skin temperature and excess perspiration. (CS 1-5). Dr. Berk recommended treatment for RSD before considering further surgery.

Dr. Odom referred Claimant to Dr. Jay D. Law to assess whether spinal cord stimulation would be appropriate. Dr. Law evaluated Mr. Stoessel on four occasions, May through August of 1999. (CX 1-6). He found no psychological etiology for Claimant's pain, although he found Claimant to be depressed and recommended counseling. In addition, Dr. Law prescribed Methadone for pain relief and recommended that Claimant undergo a spinal cord stimulation. (CX 1-6). Dr. Law is board-certified in neurological surgery.

Following his examination, Dr. Law referred Claimant to Lee D. Patton, D.C., for chiropractic treatments. Dr. Patton performed seven treatments on Mr. Stoessel, but the treatments had no "lasting decrease in his chronic pain." (CX 1-8).

Kevin J. Reilly, Ph.D, a licensed clinical psychologist, evaluated Mr. Stoessel on August 11, 1999, to determine whether he was a good candidate for the spinal cord stimulation procedure recommended by Dr. Law. (CX 1-7). Dr. Reilly found no indications that Mr. Stoessel's pain had a psychological origin and opined that he was a "good" candidate for the surgery.

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[8] Reflex Sympathetic Dystrophy is a condition in which a nerve heals abnormally following an injury to the nerve.

Dr. Stephen H. Shogan examined Claimant on February 29, 2000. (CX 1-4). He opined that surgical intervention was inappropriate at that time and recommended further diagnostic testing on the lower back region.

Dr. Amy S. Mills, who is board-certified in psychiatry, examined Mr. Stoessel on March 18, 2002. (CX 1-16). She noted Claimant's depression and suicidal tendencies and considered him a "statistically significant suicide risk." (CX 1-16). She opined that he lacked the ability to concentrate. Recommending psychotherapy and pharmacological treatment, Dr. Mills found that Mr. Stoessel was not at maximum medical improvement from a psychological standpoint.

Dr. Mills referred Mr. Stoessel to Dr. Bert S. Furmansky, who is board-certified in psychiatry and neurology, for a consultation. (CX 28). Dr. Furmansky issued a report on May 27, 2002. (CX 28). He opined that Claimant required psychiatric and psychological care for depression. He attributed the depression to Claimant's chronic pain and the affect it was having on his life. In addition, he recommended higher doses of opiate medications to lessen the pain.

John Mark DiSorbio, Ed.D., a licensed clinical psychologist, practices in "the evaluation and treatment of pain related disorders in injured individuals." (CX 7, 8). Dr. Wright referred Mr. Stoessel to Dr. DiSorbio and Claimant met with him on seven different occasions from November 2000 to May 2002. (CX 8). Initially, Dr. DiSorbio evaluated Claimant for pre-surgical readiness and the psychological impact of his physical condition. (CX 1-12). Dr. DiSorbio noted that Claimant had feelings of hopelessness regarding his condition and had thoughts of suicide. (CX 1-12). However, Dr. DiSorbio testified that as of May 2002, Mr. Stoessel had come to accept that he may never be pain-free and had reached maximum medical improvement from a psychological standpoint. (CX 8 at 19). He stressed that Mr. Stoessel should continue psychological treatment in order to "come to grips with just accepting the maintenance aspect of his condition." (CX 8 at 19).

Dr. Scott J. Primack evaluated Mr. Stoessel on November 29, 2001, to assess his physical capacity for employment. (CX 1-14). Dr. Primack is board-certified in Physical Medicine and Rehabilitation. (EX 14). After a thorough consideration of Mr. Stoessel's medical history, Dr. Primack opined that Claimant had reached MMI, but recommended continued psychological counseling and pain management. (CX 1-14). In addition, Dr. Primack found that Claimant had a thirty-one percent (31%) impairment of the whole person with nine percent (9%) of the impairment existing prior to

the March 30, 1996 injury and twenty-two percent (22%) of the impairment post-injury.

Dr. Primack issued an additional report on April 20, 2002, in which he considered the results of the April 11, 2002 Functional Capacity Evaluation (FCE) in order to assess Mr. Stoessel's work capacity. (CX 1-14). He opined that Mr. Stoessel was capable of working an eight hour day. (CX 1-14). Dr. Primack imposed physical restrictions within that eight-hour workday. He opined that sitting was limited to fifty minutes per hour. Walking and standing were limited to twenty minutes per hour. He found that Claimant could drive for ten to fifteen minutes per hour and that Claimant could push and pull objects up to twenty-five pounds for fifteen minutes per hour. Lifting was restricted to ten to twenty-five pounds in fifteen minute per hour intervals. He found no limitations in the area of reaching or movements involving wrists and elbows. Claimant could not squat or climb. In addition, he recommended that Claimant would require a two to three minute break every hour.

The record contains additional hospital and treatment records. Mr. Stoessel was treated for restless leg syndrome, pneumonia, bronchitis, a rib fracture and neck and shoulder pain between 1992 and 1998. (EX 27). I have considered these records but do not find them relevant to the determination of entitlement to benefits.

Mr. Stoessel testified that on a pain level scale of one through ten his pain is at a nine or ten "most of the time." (Tr. 93). The constant pain has affected many aspects of his life. He cannot climb the basement stairs in his house or enjoy his hobbies of fishing, automotive repair, and flying airplanes. (Tr. 97). When his pain is very severe, Mr. Stoessel will wake up in the morning just to take more pain medication and return to sleep. (Tr. 92). The majority of Mr. Stoessel's day is spent lying down, as sitting and standing can worsen his pain. (Tr. 95). Mr. Stoessel uses a cane to walk. (CX 1-15, 1-17). During the hearing, Mr. Stoessel sat leaning to the right to relieve the pressure off of his left side. (Tr. 94). Mr. Stoessel also required a break during the hearing to take more pain medication. (Tr. 122, 142).

Regarding pain medication, at the time of the hearing Mr. Stoessel was taking OxyContin, Fentanyl, and Hydrocodone. These medications affect Claimant's concentration and wakefulness. (Tr. 89). Additionally he is prescribed sleeping aids, antidepressants and muscle relaxers. (Tr. 89-91).

Mrs. Stoessel also testified at the hearing. Her testimony supports Mr. Stoessel's statements. She testified that when he is in serious pain he "turns real white and holds himself," cries, and

is angry. (Tr. 158). She stated that his condition has forced him to abandon activities he formerly enjoyed such as cooking, fishing, flying planes, visiting with friends and working with tools. (Tr. 153 to 159). Mrs. Stoessel testified that Mr. Stoessel was "getting to be a hermit." (Tr. 155).

I find Mr. and Mrs. Stoessel to have been entirely credible witnesses and conclude that their testimony regarding Mr. Stoessel's daily routine, physical limitations, effect of his medications, and the pain he experiences all to be truthful and accurate.

Vocational Evidence

1. Joseph B. Blythe

On July 23, 1999, the Department of Labor referred Mr. Stoessel to Joseph B. Blythe, a Rehabilitation Counselor, to investigate vocational rehabilitation programs for him. (CX 6). Mr. Blythe was unable to make any recommendations and closed the file on November 15, 1999, as Mr. Stoessel had not reached medical stability that would allow him to engage in a vocational rehabilitation program.

2. Douglas B. Prutting

Douglas B. Prutting met with Mr. Stoessel on May 1, 2002 to assess his suitability for employment. Mr. Prutting has a Masters' degree in Physical Medicine and Rehabilitation; is certified as a counselor by the National Council on Rehabilitation; and is a Qualified Rehabilitation Counselor for Colorado, Kansas, Alaska, and California. In issuing his May 11, 2002 report, (EX 20) Mr. Prutting considered Claimant's age, education, work history and physical restrictions according to Dr. Primack. He represented that he reviewed all of the medical evidence and was aware of the various back surgeries performed including "some fusions." (EX 19). Mr. Prutting testified that he did not consider the effects of the various narcotic pain medications Mr. Stoessel takes daily. (EX 38 at 50).

Relying on Dr. Primack's report and recommended restrictions, Mr. Prutting issued a report suggesting five suitable alternative employment opportunities for Mr. Stoessel. (EX 38 at 20-30). A labor market survey was performed to select possible positions. Mr. Prutting contacted and/or visited the job opportunity locations, but did not inform the potential employers of Claimant's age, education, work history and medical restrictions. (EX 38 at 34-38). The recommended available job opportunities were Retail

Inventory Specialist, Operations Dispatcher, Machine Operator, Assembler, and General Office Runner.

The Retail Inventory Specialist position involved maintaining and managing the inventory in the stockroom of a Car Toys store and paid $10.00 to $11.00 an hour. (EX 19, EX 38 at 53). Mr. Prutting visited one of the local Car Toys stores and was able to see the stockroom. He noted that the stock was situated on shelving units from the floor to about five and a half feet in height and that the stock items individually were generally less than twenty pounds. (EX 38 at 32, 53).

The Operations Dispatcher position required answering telephones, dispatching information, and minimal computer use for the Moving World moving company. (EX 19). This position paid $13.50 per hour. Mr. Prutting was unsure if the company offered training on the computer software program used by the company. (EX 38 at 33). He noted that the telephone system used a headset. Mr. Prutting testified that he believed Mr. Stoessel had an appropriate personality for this job involving people skills while acknowledging that Dr. Primack had recommended anger management for Mr. Stoessel. (EX 38 at 54).

In the Machine Operator position, the employee would operate a hamburger patty press for Mountain Meat by pushing buttons. (EX 38 at 34). Mr. Prutting testified that he believed the company provided training on the machine. (EX 38 at 34). Mr. Prutting was unsure whether the operator would sit or stand while operating the machine. Mountain Meat imposed a production requirement on this position, which put this position into a light-duty rather than sedentary category. (EX 38 at 35).

The Assembler position at Intrex Corporation paid between $8.00 and $9.00 per hour. (EX 19). A production requirement was imposed on this position as well, placing it in the light-duty category. (EX 38 at 35). Any lifting required for the position would be less than six pounds. Mr. Prutting did not know whether the assembler would sit or stand during work. (EX 38 at 58). The exact job duties were not fully explained.

In the General Office Runner position, the employee would deliver paperwork and other material from one car dealership to another in the John Elway Ford West dealership family. (EX 38 at 36). This position paid $7.00 per hour. (EX 19). The short trip deliveries would be made by vehicle although no commercial driving license was needed. Mr. Prutting testified that the dealership would be unlikely to hire Mr. Stoessel as he took narcotic medication daily for his pain. (EX 38 at 59).

3. Pat McKenna

Pat McKenna, a registered occupational therapist, administered a Functional Capacity Evaluation (FCE) on Mr. Stoessel from April 8 to 10, 2002. (CX 1-17). Ms. McKenna has over forty years of experience as an occupational therapist and is a member of the American Occupational Therapy Association, the Occupational Therapy Association of Colorado and the Brain Injury Association. (CX 12). In addition to the three-day FCE, Ms. McKenna observed Mr. Stoessel as he completed another FCE on April 11, 2002. (CX 1-17). In issuing her April 11, 2002 report, Ms. McKenna considered Claimant's age, education, work history, his physical and psychological restrictions, and the affect of his medications.

Ms. McKenna opined that Mr. Stoessel's unpredictable symptoms make him unemployable. (CX 1-17). She found that his most severe pain and muscle spasms could be triggered easily and was "so substantial that it could render him incapable of returning to a job for several days in a row or be unable to finish his shift." (CX 1-17).

Ms. McKenna recommended job restrictions based on Mr. Stoessel's performance in the three-day FCE. For sitting-based occupations, she found on rare occasions Claimant could sit for sixty minutes, but optimally he could sit for twenty minutes for three or four hours in a day. (CX 1-17). Standing would be limited to five to ten minutes for thirty to forty minutes per day. Mr. Stoessel could tolerate walking for fifteen to twenty minutes a day for one to two hours per day. Driving would be limited to twenty to thirty minutes for one hour per day. Mr. Stoessel could lift up to thirty pounds from knuckle height to chest height, ten pounds overhead, and rarely would he be able to lift any weight from the floor to knuckle height. However, Ms. McKenna stressed that were Mr. Stoessel to "move wrong" as he did during the FCE and trigger a severe pain or muscle spasm reaction, he would be unable to complete any of these tasks.

Ms. McKenna also noted that when experiencing severe pain, Mr. Stoessel had difficulty focusing, concentrating and problem-solving. (CX 1-17). She observed Mr. Stoessel while in severe pain and noted that he doubled up and closed his eyes.

As part of the FCE, Mr. Stoessel performed tasks that would be part of the regular duties of several types of employment. (CX 1-17). Ms. McKenna analyzed the results of those tasks and determined whether it was likely Mr. Stoessel could engage in that employment. She found Fast Foods Worker to be ill-suited for Mr. Stoessel's condition. For forty-five minutes he was able to prepare a light meal, but needed a stool to aide in switching

positions. He could not access the lower cupboards or the higher cupboards, if required to reach up with both hands. Ms. McKenna noted that after this task, Mr. Stoessel's pain "reached very severe levels."

Ms. McKenna opined that Mr. Stoessel's limited walking and standing tolerances made the positions of sales clerk and counter clerk very unlikely. (CX 1-17). Regarding the position of inventory clerk, Ms. McKenna found that his inability to bend down to access merchandise at lower levels would eliminate that position as a possibility.

Mr. Stoessel performed an assembly task during the FCE in which he could alternate between sitting and standing while assembling. (CX 1-17). Although he had "excellent skill with the use of his hands," he could not continue such activity in one position and he ended up in severe pain that rendered him unable to continue the activity. (CX 1-17).

Ms. McKenna found small engine repair ill-suited for Mr. Stoessel. (CX 1-17). Although he possessed the mechanical skill, Mr. Stoessel could not withstand the bending and twisting required. Ms. McKenna opined that Claimant would only be able to complete one such repair per day and would then have to "rest for a long period of time." (CX 1-17).

Finally, Ms. McKenna determined that a security guard position would not be suitable for Mr. Stoessel. (CX 1-17). His "limited standing, walking, sitting and stair climbing tolerances would need to be considered in any job in this arena." Even if the position involved video monitoring only, Mr. Stoessel's sitting intolerance would interfere with the duties of the job. (CX 1-17).

4. Mark E. Litvin, Ph.D.

Mark E. Litvin, Ph.D. interviewed Mr. Stoessel on May 16, 2002, for a vocational rehabilitation evaluation. (CX 4). Dr. Litvin's doctorate is in Rehabilitation and Social Services Administration and he has been working in the rehabilitation and vocational field since 1978. He is a Certified Rehabilitation Counselor, a Diplomat on the Board of Vocational Experts, a Qualified Rehabilitation Counselor in Colorado, an Approved Treatment Provider for Colorado and a Fellow of the American College of Forensic Examiners. (CX 11).

In issuing his May 16, 2002 report, Dr. Litvin considered Claimant's age, education, work history, his physical and psychological restrictions, and the affect of his medications. Dr. Litvin opined that Claimant is "severely work disabled and cannot

maintain any regular employment that exists in the labor force." (CX 4). He testified that Mr. Stoessel was unable to work because of his age, education, work history, transferable skills, impairment and his chronic easily aggravated pain. (CX 26). Dr. Litvin mentioned in both his report and testimony the extent to which Claimant was taking medications. (CX 4, 26). He testified that because of those medications, Claimant should not drive or operate machinery. (CX 26). In addition, he stated that Claimant could not perform the Retail Inventory Specialist position, selected by Mr. Prutting, as he would be unable to bend down to access the lower shelves in the stockroom.

Regarding Ms. McKenna's FCE, Dr. Litvin found it to be more "useful" than the other vocational evidence of record as it contained observations over a three-day period which allowed an evaluator to see the "cumulative impact" of coming to work. (CX 26).

5. Kim M. Lehmann

On April 11, 2002, Kim M. Lehman, a Registered Occupational Therapist, administered a FCE to Mr. Stoessel. (CX 1-15). She has worked in the occupational therapy field since 1991 and is also a certified hand therapist. (EX 35). In issuing her report, Ms. Lehman considered Claimant's age, work history and physical restrictions; she did not consider the effect of his medications. (CX 1-15). During the FCE administration, Ms. Lehmann found Claimant to have put forth a maximum effort although many of the individual tests had to be stopped due to his pain.

Ms. Lehman recommended physical work limitations based on the results of the FCE. She opined that Claimant was capable of sustained sitting for forty-five minutes and sustained standing or walking for ten minutes. (CX 1-15). She found that Claimant was not limited regarding reaching at waist-high and higher levels. Lifting was limited to thirty pounds from knuckle to shoulder height, twenty-five pounds from shoulder to overhead, and inability to lift any weight from floor to knuckle height. Finally, she opined that Claimant was incapable of squatting.

DISCUSSION AND APPLICABLE LAW

The parties have stipulated that the March 30, 1996 accident arose in the scope of employment and during an existing employer/employee relationship. The parties dispute the nature and extent of the injury. Once it is established that the injury is work-related, the Claimant has the burden to prove the nature and

extent of his disability from that injury. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985).

Nature of Disability

A claimant's disability may be permanent or temporary in nature. Disability is permanent if a residual disability remains after a claimant has reached maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274, (1989); Trask, at 60. Until a claimant reaches MMI, his disability is temporary in nature. The date of MMI is a question of fact to be determined by the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

On brief, Employer asserts that Claimant reached MMI on July 19, 2001. Additionally, both parties acknowledged on brief that Mr. Stoessel's disability was permanent. Dr. Frey opined that Claimant reached MMI on this date from a structural standpoint as he felt there was nothing more surgically that could be done for Mr. Stoessel. (CX 1-11, CX 10). Dr. Wright agreed with Dr. Frey's assessment that Claimant reached MMI on July 19, 2001. (CX 15 at 48). Dr. Primack opined that Claimant reached MMI on November 1, 2001. (EX 16 at 15). Both Drs. Frey and Wright treated Claimant and saw him on a regular basis. They were aware of his many surgeries and the future treatment possibilities. Dr. Primack did not explain his selection of November 1, 2001 as an MMI date. I find the opinions of Drs. Frey and Wright to be reasoned regarding MMI. Therefore, I find that Claimant reached MMI on July 19, 2001 and I find Claimant's disability to be permanent in nature.[9]

Extent of Disability

The LHWCA defines disability as incapacity to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). Thus, a Claimant must suffer an economic loss in addition to his physical or psychological impairment. Sproull v. Stevedoring Services of America, 25 BRBS 100, 110 (1991). Economic loss includes both current economic harm and potential economic harm resulting from the impact of the present injury on future earning opportunities. Metropolitan Stevedore Co. v. Rambo (*Rambo II*), 117 S.Ct. 1953, 1955 (1997). A claimant may be found to have either no loss of wage-earning capacity, no present loss but with a reasonable

[9] The record contains evidence regarding Mr. Stoessel's psychological condition and conflicts regarding whether he has reached MMI psychologically. However, the parties have not chosen to bring that matter into controversy and I make no finding regarding psychological MMI.

expectation of future loss (*de minimus*), a total loss, or a partial loss.

A claimant has established a prima facie case for total disability upon a showing that he cannot return to his regular employment due to his work-related injury. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980); Trask, 17 BRBS at 59. The burden then shifts to the employer to show that suitable alternative employments exists for that claimant. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991).

The evidence of record reveals that Claimant is no longer capable of engaging in employment as a commercial truck driver. The physicians who examined Claimant imposed limitations on the type of duties he can perform that eliminate the possibility of returning to truck driving. On brief, Claimant asserts that he cannot perform this work and Employer concedes to this assertion as well. Hence, Claimant has met his *prima facie* showing for total disability.

Employer proposed five job opportunities to carry its burden to show that suitable alternative employment exists for Claimant. To satisfy its burden Employer must identify actual, specific job opportunities within Claimant's local community that Claimant can perform and obtain. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43 (14 BRBS 156, 164-65 (5th Cir. 1981); Bumble Bee, 629 F.2d at 1330. Claimant must be able to reasonably perform the identified job opportunities given his age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 114 S.Ct. 1539 (1994). The trier of fact must consider a claimant's physical restrictions and particular skills in order to determine whether a claimant is able to perform the identified job opportunities. Hairston v. Todd Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988). If the employer meets its burden in showing suitable alternative employment exists, the claimant may rebut employer's showing by demonstrating that he made a diligent effort to obtain such work but was unsuccessful. Edwards, 999 F.2d at 176 n.2.

Employer has offered five job opportunities as reported in the vocational evaluation of Mr. Prutting. Each position was available in Mr. Stoessel's local area. The job opportunities are as follows: (1) Retail Inventory Specialist; (2) Operations Dispatcher; (3) Machine Operator; (4) Assembler; and (5) General Office Runner.

I find the Retail Inventory Specialist position to be unsuitable alternative employment for Mr. Stoessel. The majority

of the medical evidence and vocational evidence, as well as Claimant's own testimony, show that he cannot bend or squat without experiencing severe pain and muscle spasms. This position requires stocking shelves and accessing merchandise on shelving units that extend from the floor to five and a half feet in height. In order to access the lower shelves, Mr. Stoessel would have to bend or squat, rendering this position unsuitable.

Mr. Pruttig selected an Operations Dispatcher position as suitable alternative employment for Claimant. Mr. Prutting testified that he assumed this position allowed for alternating between sitting and standing and the ability to adjust the work surfaces, although he provided no information that this was actually the situation at this particular job. (EX 38 at 33). Thus, as Employer has not established the exact nature of the job, I cannot determine its suitability for Mr. Stoessel.

I find the Machine Operator position also to be unsuitable alternative employment. Mr. Prutting provided no information as to whether the position involved continuous sitting or standing. As Mr. Stoessel is physically restricted regarding sitting and standing, I cannot determine whether this position is suitable. Dr. Primack testified that he did not believe Claimant could be a machine operator because of the bodily twisting involved. (EX 17 at 55). Dr. Litvin opined that Claimant should not operate machinery while on narcotics. (CX 26 at 15). Mr. Stoessel is prescribed narcotic pain medication and the record contains no evidence that he will not continue taking them for the time being. Therefore, I find this position to be unsuitable for Mr. Stoessel.

Mr. Prutting selected an Assembler job opportunity for Claimant as suitable alternative employment. Mr. Stoessel possesses the skills for such a position and the duties of the job fall within Claimant's lifting restrictions. However, Mr. Prutting provided no information concerning whether the position was seated or not and whether twisting of the torso would be necessary. As a result, I am unable to determine whether this position would comply fully with Claimant's physical restrictions. During the FCE with Ms. McKenna, Claimant performed an assembly task in which he was able to alternate sitting and standing, but was unable to perform the task for very long due to pain. As this position has a quota requirement, it seems unlikely that Claimant would be able to achieve the quota. I also find this position to be unsuitable alternative employment for Mr. Stoessel.

I find the General Office Runner position to be unsuitable alternative employment for Mr. Stoessel as well. This position involved vehicle delivery for a car dealership. Dr. Frey and Dr. Litvin opined that Claimant should not drive while on narcotics.

(CX 10, CX 26). Mr. Prutting, who initially selected this position, testified that a car dealership would not hire someone to drive who was on narcotics. (EX 38 at 59). At the time of the hearing, Mr. Stoessel was taking several narcotic pain medications and the record contains no evidence that he will be taken off those medications in the near future. Therefore, I find this job opportunity to be unsuitable for Mr. Stoessel.

Regarding all five positions, the record contains no evidence as to the hours involved in these positions. It is unclear whether the positions are full-time or part-time. Dr. Frey opined that Claimant was unable to work a forty-hour work week of five eight-hour days. (CX 10 at 43). He testified that Claimant could probably work one hour a day, but could not speculate beyond that how many hours he was capable of working. (CX 10 at 43). Ms. McKenna and Dr. Litvin opined that Mr. Stoessel would not be able to work even one hour a day on a regular basis. (CX 13 at 43, CX 26 at 57). Ms. McKenna and Dr. Litvin have extensive experience in vocational rehabilitation. In addition, Ms. McKenna observed Mr. Stoessel over four days during her FCE and Ms. Lehmann's FCE. Dr. Frey treated Mr. Stoessel over a period of months. Due to their expertise and Ms. McKenna and Dr. Frey's familiarity with Mr. Stoessel's condition, I find their opinions more persuasive regarding Claimant's work capacity. Therefore, as the record contains no evidence regarding the required hours of these five positions, I cannot determine whether they represent suitable alternative employment for Mr. Stoessel.

In sum, I find none of the five job opportunities selected by Employer are suitable alternative employment for Mr. Stoessel. The credible testimony of Claimant and Mrs. Stoessel also tends to strongly dispute a finding of the Claimant's having any work capability. Therefore, Employer has failed to satisfy the burden of proving suitable alternative employment. I conclude that Mr. Stoessel is permanently totally disabled.

Average Weekly Wage

Section 10 of the LHWCA establishes three alternative methods for determining a claimant's average annual earnings, 33 U.S.C. § 910(a)-(c), and then dividing that number by fifty-two, pursuant to Section 10(d) to arrive at an average weekly wage (AWW). The methods are directed towards establishing a claimant's earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Orkney v. General Dynamics Corp., 8 BRBS 543 (1978); Barber v. Tri-State Terminals, 3 BRBS 244 (1976), aff'd sub nom.

Tri-State Terminals v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) applies if the Claimant has "worked in the same employment...whether for the same or another employer, during substantially the whole year immediately preceding his injury." 33 U.S.C. § 910(a); Empire United Stevedores *v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). "Substantially the whole year" refers to the nature of Claimant's employment, whether it is permanent or intermittent. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990); Eleaver v. General Dynamics Corp., 7 BRBS 75 (1977). Work for different employers can be combined in determining whether a claimant has worked substantially the whole year if the claimant used comparable skills for each employer. Hole v. Miami Shipyards Corp., 12 BRBS 38 (1980).

On brief, Employer argues that Section 10(a) is applicable as Claimant worked substantially the whole year prior to injury in the same employment. Claimant argues that Section 10(a) is inapplicable as Claimant did not work substantially the whole year prior to his injury and that calculation of AWW under Section 10(a) would not accurately represent his earning capacity at the time of injury.

Claimant was injured on March 30, 1996; therefore, the fifty-two week period prior to that injury would be March 31, 1995 to March 29, 1995. During that period, Claimant worked for six different employers. From March 31, 1995 until the end of June 1995, Claimant was a full-time truck driver for Envirodyne, a period of twelve weeks. (EX 8). From July 15, 1995 until September 30, 1995, Claimant was a full-time truck driver for Mountain Mobile, for a period of ten weeks. In addition, Claimant worked part-time for RPS and Scaff Enterprises, Inc., as a truck driver, prior to and throughout the fifty-two week period. The record contains no evidence of the actual dates and hours worked for RPS and Scaff. Claimant also worked part-time for M & G Engines, Inc. from March of 1995 to March of 1996, testing and training CDL applicants. (EX 8). Claimant's 1995 W-2 shows that he earned $720.00 from M & G Engines, and the record contains no evidence of earnings for that company in 1996. (EX 7). Claimant earned $15.00 per hour at M & G Engines. (EX 8). Therefore, based on those figures, Claimant worked forty-eight hours, or six eight-hour days, for M & G Engines. In January and February of 1996, Claimant worked as a part-time truck driver for Norac, Inc., a division of Mountain Mobile. Claimant's 1996 W-2 form for Norac shows earnings of $3,720.000. (EX 7). Claimant earned $16.10 per hour for Norac and thus the calculation can be made that Claimant worked the equivalent of 28 days or four weeks for Norac within the

fifty-two week period prior to his injury. On March 22, 1996, Claimant arrived in Hungary to begin his commercial driving job with Brown & Root. He worked seven days before the date of his accident.

In sum, the record contains evidence that Claimant could have worked 28 weeks between March 31, 1995 and March 29, 1996.[10] However, the Form 1099 and W-2 wage statements do not separate overtime earnings from regular earnings and so I cannot determine the actual weeks worked for each job. Claimant testified that he worked overtime for these companies. (EX 34 at 60, Tr. 125). Furthermore, the record does not contain evidence as to the hours and dates worked for the part-time work for RPS and Scaff. Therefore, I cannot accurately determine the total number of weeks Claimant worked during the fifty-two week period.

Claimant testified that from the Fall of 1995 through the Winter of 1996, he did not work as much as he would normally as he anticipated working for Brown & Root overseas. (Tr. 76). He stated, "I stayed away from anything permanent. I only wanted to work part-time so that I didn't leave an employer holding the bag." (Tr. 76). If the pre-injury fifty-two week period is less than the claimant would normally earn, it is proper not to base AWW on those earnings. Cummins v. Todd Shipyards, 12 BRBS 283, 286 (1985). In addition, determination of AWW can be based on actual earnings in the year prior to injury as well as the amount the claimant could have earned had he not lessened his workload due to a voluntary or involuntary non-recurring event. Amon v. Ceres Marine Terminals, 35 BRBS 826 (ALJ 2001); cf. Geisler v. Continental Grain, 20 BRBS 35 (1987)(holding that the employer is not responsible for the claimant's pre-injury voluntary removal from the work force to take a thirty hour per week volunteer position).

Were I able to make an accurate determination of time worked during the year prior to Claimant's injury, a calculation of AWW for that period would not take into account the increased earnings of the overseas position with Brown & Root. If a claimant received a promotion, demotion or change in salary prior to his injury, that claimant's true earning capacity cannot be calculated under Section 10(a). Hastings v. Earth Satellite Corp., 628 F.2d 85, 95 (D.C. Cir. 1980); Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 754 (7th Cir. 1979); Le v. Sioux City & New Orleans Terminal Corp., 18 BRBS 175 (1986). Therefore, I find Section 10(a) inapplicable to the determination of Claimant's AWW.

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[10] The figure is derived thusly: 12 weeks at Envirodyne + 10 weeks at Mountain Mobile + 1 week at M&G Engines + 4 weeks at Norac + 1 week at Brown & Root.

Where Section 10(a) is inapplicable, it must be determined if Section 10(b) applies before calculating AWW under Section 10(c). Palacios v. Campbell Industries, 633 F.2d 840 (9th Cir. 1980). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of the injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). Empire United Stevedores, 936 F.2d at 821. Calculation of AWW under Section 10(b) requires using the wages of employees of the same class as the claimant, who worked substantially the whole year prior to the claimant's injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b).

On brief, each party argued that Section 10(b) did not apply as no employees of the same class exist in Claimant's case. The record reveals that Brown & Root began to employ truck drivers for the Balkan region in December of 1995. (CX 2). An employee hired in December of 1995, would only have worked approximately four months by the time of Claimant's March 30, 1996 injury. Although continuous work for 28 weeks has been held to constitute "substantially the whole year," an employee hired in December would have worked only seventeen weeks prior to Claimant's date of injury. Eleaver, 7 BRBS 75, 79 (1977). Thus, although Brown & Root hired other employees of the same class as Claimant who were in the same employment in the same place, that class of employees did not work substantially the whole of the year prior to Claimant's injury. Therefore, I find that Section 10(b) is inapplicable.

If neither Section 10(a) nor 10(b) can be applied "reasonably and fairly," then calculation of average annual earnings under Section 10(c) is appropriate. Empire United Stevedores, 936 F.2d at 821; Walker v. Washington Metropolitan Area Transit Authority, 793 F.2d 319 (D.C. Cir. 1986).

The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c) with the directive of arriving "at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins*, 12 BRBS at 285. In determining earning capacity under Section 10(c), it is appropriate to consider "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 757, 10 BRBS 700, 706-707 (7th Cir. 1979). See also Empire United Stevedores, 936 F.2d at 823.[11]

[11] In Tri-State Terminals v. Jesse, 596 F.2d 752 (7th Cir. 1979), the claimant, a longshoreman, suffered a compensable injury prior to a boom year at that particular harbor. The ALJ who initially heard the case did not

The record contains evidence reflecting Claimant's earnings from 1991 to 1996. Social Security records show that Claimant earned $30,239.71 in 1991. (EX 10). Claimant had a spinal fusion in February of 1992 and did not work the remainder of that year. (CX 1-1, EX 10). The record supports that assertion as Claimant earned only $1,019.13 in 1992. (EX 10). The record reveals that Claimant worked the last six months of 1993 as he was still recovering from his surgery at the beginning of that year. (Tr. 106, EX 12). The Social Security records show that Claimant earned $16,649.20 while working for Envirodyne in 1993. (EX 10). In 1994, Claimant worked full-time throughout the year for Envirodyne and earned $37,425.23. (EX 10). Claimant continued to work for Envirodyne from January, 1995, until the end of June, 1995, earning $19,728.76. (EX 10). Claimant also worked for Mountain Mobile from July 15, 1995 until September 30, 1995, earning $10,971.45 according to the Form 1099s for that employer. (EX 7). In addition, the Social Security records and wage statements in the record, Claimant earned $720.00 from M & G Engines, Inc. and $99.00 from Ernie Baylog, Inc. (EX 7, 10). Thus, the record reveals total earnings of $31,519.21 for 1995. In 1996, Claimant earned a total of $5,540.70, when adding together $3,720.00 for his work with Norac, Inc. and $1,820.70 for Brown & Root before his injury. (EX 7, 12).

While working for Brown & Root, Claimant had a base salary of $2,259.00 per month, amounting to $13.03 per hour.[12] (EX 12). In general, the overseas truck drivers worked twelve hours a day, seven days a week as they were not restricted in road hours as in the United States.[13] However, employees were paid straight time instead of time and a half for hours worked over forty. (EX 12). According to the employment contract, Claimant would receive fifteen percent (15%) of his base salary as a foreign service bonus, which would be received with each pay. (EX 12). Claimant was paid monthly. (EX 12). Furthermore, the contract provided for a Work Area Differential of twenty-five percent (25%) of base salary and Hazard Pay of twenty-five percent (25%) of base salary if the employee was located in Bosnia. (EX 12). The contract provided for a Work Area Differential of five percent (5%) if the employee was located in Hungary outside of Budapest. (EX 12).

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include potential earnings in the boom year under the Section 10(c) calculation of average weekly wage. The Benefits Review Board had remanded the case to the ALJ to consider the earnings the claimant would have earned had he not suffered an injury and was able to work in the boom year. *Id.* at 754. The Seventh Circuit upheld this order finding that the Board was "within the scope of its statutory authority." *Id.* at 758.

[12] $2259.00 (per month) x 12 (months) ÷ 52 (weeks) ÷ 40 (hours per week) = $13.03 per hour.

[13] Claimant worked 114 hours the week before his accident. (EX 12).

Prior to Claimant's injury, he was located in Kaposvár, Hungary. Therefore, he would have been entitled to both the Foreign Service Bonus and the five percent Work Area Differential for a Hungarian location outside Budapest. Claimant testified that when hired he was told he would be working in Bosnia even though he was in Hungary at the time of his injury. (Tr. 63, EX 34 at 24). After Claimant left the Balkan region, the drivers from his training class began working in Bosnia. (Tr. 119). Including the salary additions, Claimant earned $15.64 per hour while working in Kaposvár, Hungary, at the time of his injury.[14] Were Claimant not injured and worked in Bosnia with the other members of his training class, Claimant would have earned $21.50 per hour.[15] (EX 12). Claimant would have worked at least twelve hours a day, seven days a week for a total of eighty-four hours a week. In sum, Claimant would have earned $1,806.00 per week and $21,672.00 in a three-month period.[16]

On brief, Claimant argued that AWW should be calculated using the salary he was earning at the time of the injury as it was an increase in earning capacity reflecting his true earning capacity. The Benefits Review Board has affirmed calculations under Section 10(c) for claimants who received salary increases shortly before their injuries. See Le v. Sioux City & New Orleans Terminal Corp., 18 BRBS 175, 177 (1986). (affirming the ALJ's decision to include a recent fifty cent per hour pay raise in the claimant's AWW calculation). However, the nature of Claimant's employment with Brown & Root was not permanent and to calculate AWW based on Claimant's salary with Brown & Root alone would result in a distorted AWW. The employment contract with Brown & Root stated that Claimant's assignment was to last "three months or the duration of the job, subject to additional extensions." (EX 12).

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[14] Calculation for Hungary pay: $2259.00 (base salary per month) x .15 (Foreign Service Bonus) = $338.85. $2259.00 x .05 (Work Area Differential) = $112.95. $2259.00 + $338.85 + $112.95 = $2710.80 (straight salary per month including salary additions). Hourly wage computed as $2710.80 (per month) x 12 (months) ÷ 52 (weeks) ÷ 40 (hours per week) = $15.64 per hour.

[15] Calculation for Bosnia pay: $2259.00 (base salary per month) x .15 (Foreign Service Bonus) = $338.85. $2259.00 x .25 (Work Area Differential) = $564.75. $2259.00 x .25 (Hazard Pay) = $564.75. $2259.00 + $338.85 + $564.75 + $564.75 = $3728.35 (straight salary per month including salary additions). Hourly wage computed as $3727.35 (per month) x 12 (months) ÷ 52 (weeks) ÷ 40 (hours per week) = $21.50 per hour.

[16] Calculation: $21.50 (per hour) x 84 (hours per week) = $1,806.00 (earnings per week) x 12 (weeks in 3 months) = $21,672.00.

Although it was possible for the assignment to extend over three months, it was not guaranteed. Employer had purchased a plane ticket for Mr. Stoessel to return to the United States on June 23, 1996, exactly three months after his arrival in the Balkan region. (EX 12). The record contains evidence that among the employees hired within the same time period as Claimant, thirty-seven percent (37%) worked overseas for three months or less, twenty-three percent (23%) worked between three and six months, nineteen percent (19%) worked between six and twelve months, and twenty-one percent (21%) worked twelve months or more. (CX 2). To calculate Claimant's AWW at the rate earned at the time of injury would be speculative.

On brief, Employer argued that AWW should be calculated by averaging Claimant's yearly earnings from 1991 up to Claimant's injury date. Employer argued that potential earnings with Brown & Root should not be included in that calculation as Claimant volunteered to return to the United States as part of a reduction in force and as his contract did not promise that the assignment would last a certain amount of time. Although Claimant did volunteer to leave his assignment as part of a reduction in force, he testified that had it not been for his injury, he would have continued to work. (Tr. 83). Claimant was well-qualified for the position with Brown & Root and Mrs. Stoessel testified as to his excitement for working overseas and his desire to work there to save money for retirement. (Tr. 145). I find that were Claimant not injured, he would have continued to work for Brown & Root for at least the contract length of three months. Therefore, I find that three months worth of Brown & Root earnings should be included in the calculation of AWW under Section 10(c) in order to reflect his true earning capacity.

To arrive at a reasonable and fair AWW, I will look to Claimant's yearly earnings from 1991 to 1996, including the amount of three months of earnings for Brown & Root. In 1991, Claimant earned $30,239.72. In 1992, Claimant earned only $1,019.13, as he could not work after his spinal fusion surgery in February of that year. As Claimant only worked approximately one month of 1992 for medical reasons, I will not include the earnings from 1992 into the calculation. Claimant was still recovering from surgery for the first half of 1993. Claimant earned $16,649.20 in the second half of 1993. Therefore, those earnings will receive half-year weight in the calculation. In 1994, Claimant earned $37,425.23 for a full year, which will be included in the calculation. In 1995, Claimant earned $32,239.21 working forty weeks.[17] Those earnings encompass

[17] Claimant worked from January 1, 1995 to June 30, 1995 for Envirodyne, a total of 29 weeks. Claimant worked from July 15, 1995 to September 30, 1995 for Mountain Mobile, a total of 10 weeks. Claimant

three-quarters of the year for 1995 and will receive three-quarter-year weight in the calculation. In 1996, Claimant earned $5,540.70. This figure includes four weeks' work for Norac, Inc. throughout January and February of 1996 and one week's work for Brown & Root from March 22, 1996 to March 29, 1996.

In addition to actual wages earned in 1996, the calculation will include the amount Claimant would have earned from Brown & Root had he completed the remainder of his contract. Claimant worked one week of his three month contract; thus, the completed contract earnings will be computed based on the eleven weeks remaining on the contract. As discussed above, Claimant would have earned $21.51 per hour in an average work week of twelve hours a day, seven days a week. Therefore, for eleven weeks of work Claimant would have earned $19,866.00.[18] This figure will be added to the actual 1996 earnings of $5,540.70 for a total earnings of $25,406.70 in 1996. These figures represent sixteen weeks, or four months of earnings and will receive weight of one-third of a year in the calculation.

The above findings establish Claimant's AWW to be calculated as follows:

Average Yearly Wage from 1991 to 1996

[$30,239.72 (1991 earnings) ÷ 1 (year)] +
[$16,649.20 (1993 earnings) ÷ .5 (year)] +
[$37,425.23 (1994 earnings) ÷ 1 (year)] +
[$32,239.21 (1995 earnings) ÷ .75 (year)] +
[$25,406.70 (1996 earnings) ÷ .333 (year)] =
$220,245.40 (total for all 5 years) ÷ 5 (years) = $44,049.07 (average yearly wage for 5 years).

Based upon the above findings, I conclude that Albert Stoessel had an average weekly wage computed as follows:

$44,049.07 (average yearly wage) ÷ 52 (weeks) = $847.10 (average weekly wage).

Liability for Medical Treatment

Pursuant to Section 7(a), an employer found liable for the payment of compensation is responsible for those medical expenses

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worked part-time for M & G Engines for the equivalent of one week of work as discussed above.

[18] Calculation: $21.50 (per hour) x 84 (hours per week) = $1,806.00 (per week) x 11 (weeks) = $19,866.00.

reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). The claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). A claimant has established a prima facie case for compensable injury where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. See Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

Claimant argues that Employer has not paid for two radio frequency procedures. Employer argues that it has paid for one of the procedures, but need not pay for the second procedure as it is not reasonable or necessary. The record contains no evidence showing whether or not either treatment has been paid for.

On brief, Employer argues that the second radio frequency procedure was not reasonable or necessary as the first procedure did not provide Mr. Stoessel with long-term relief. Dr. Wright testified that the radio frequency procedures are treatment "adjunct to [Claimant's] other treatments ...to...keep the whole pain syndrome under control." (CX 16 at 27). Dr. Primack testified that Claimant would not be aided by radio frequency procedures, but did not offer the reasons therefore. (EX 16 at 20). Dr. Frey testified that he would not "suggest further radio frequency procedures" if the initial procedure was ineffective. (CX 10 at 38). However, Dr. Frey noted that he had not "discussed the specifics of how effective" those procedures were for Mr. Stoessel and deferred to Dr. Wright's records. (CX 10 at 39). Dr. Wright has administered thousands of these radio frequency procedures and found a repeat procedure to be beneficial in alleviating some of Mr. Stoessel's pain. (CX 16 at 25-28). Dr. Wright has treated Mr. Stoessel for two years and is familiar with his condition. (CX 9, 16). I accept Dr. Wright's testimony and medical opinions finding them well-reasoned. Therefore, I find that both radio frequency procedures were reasonable and necessary and that Employer is responsible for any unpaid procedures under Section 7(a).

Attorney's Fees

Claimant's counsel has fifteen days to submit an application for an attorney's fee. The application shall be prepared in strict accordance with 20 C.F.R. § 702.132. The application must be

served on all parties, including the claimant, and proof of service must be filed with the application. The parties are allowed fifteen days following service of the application to file objections to the application.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

1. Employer shall pay Claimant compensation for temporary total disability from March 30, 1996 to July 18, 2001 based on Claimant's average weekly wage of $847.20, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent total disability from July 19, 2001 and continuing based on Claimant's average weekly wage of $847.20, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay all reasonable appropriate and necessary medical expenses arising from Claimant's March 30, 1996 work injury and its residuals, pursuant to the provisions of Section 7 of the Act, and including any unpaid radio frequency procedures.

4. The Employer is entitled to Special Fund relief pursuant to Section 8(f) of the Act.

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Rudolf L. Jansen
Administrative Law Judge